No. 97-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AURELIA DAVIS, as next friend of LaSHONDA D.,

Petitioner,

—v.—

MONROE COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF GEORGIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Georgia is one of its statewide affiliates. In 1971, the ACLU established its Women's Rights Project, which has been at the forefront of the battle for women's equality in schools and elsewhere for the past three decades. The proper interpretation of Title IX is therefore a matter of great concern to the ACLU and its members. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

STATEMENT OF THE CASE

LaShonda Davis was in the fifth grade at Hubbard Elementary School when she first complained to her teachers that the classmate assigned to the seat next to her was sexually harassing her. The harassment took various forms, including offensive language, fondling, and sexual abuse, and recurred repeatedly over the course of five months. On numerous occasions, LaShonda and her mother, Aurelia Davis, reported the conduct to her teachers and to the school principal. Despite her repeated calls for intervention, school officials provided LaShonda with no protection other than granting her request for a different seat assignment -- and

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

even that minimal action was not taken until LaShonda had complained of the student's harmful conduct for three months. After the school failed to discipline the student who harassed LaShonda, despite the increasingly harmful effects of the conduct on LaShonda, Mrs. Davis finally reported the conduct to the Sheriff's office. The harassing student was ultimately charged with sexual battery, a charge which he did not deny.

Petitioner then brought an action alleging that the school board and two school officials had violated section 901 of the Education Amendments of 1972, Pub.L.No. 92-318, 86 Stat. 235, 373 (1972)(codified as amended at 20 U.S.C. §§1681-1688 (1994))("Title IX"), and 42 U.S.C. §1983, by failing to prevent the sexual harassment.

The district court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 368 (M.D.Ga. 1994). On appeal, a panel of the Eleventh Circuit reinstated petitioner's Title IX claim, holding that Title IX embraces claims of peer harassment in school, just as Title VII embraces claims of peer harassment in the workplace. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193-95 (11th Cir. 1996). The panel decision was then reversed by the Eleventh Circuit *en banc*. The *en banc* court justified its narrow construction of the statute by noting that Title IX was passed under the Spending Clause, without considering whether Congress also had enacted Title IX pursuant to Section 5 of the Fourteenth Amendment. 120 F.3d 1390, 1397 (11th Cir. 1997).

SUMMARY OF ARGUMENT

The Eleventh Circuit's narrow construction of Title IX rests squarely on its holding that Congress enacted Title IX pursuant to its Spending Clause powers. As petitioner's

brief demonstrates, the Eleventh Circuit's reasoning is flawed even on its own terms.

This brief addresses a separate but equally fundamental error: while we agree that Title IX was enacted pursuant to the Spending Clause, we do not believe that the Spending Claus provided the *only* source of constitutional authority. Contrary to the court below, we believe it is clear from the text and legislative history that Title IX was also adopted pursuant to Section 5 of the Fourteenth Amendment, which grants Congress broad powers to enforce the Equal Protection Clause.

The unambiguous purpose of Title IX is to prohibit sex discrimination in federally funded education programs. It was enacted in response to what Congress perceived as a pervasive and ongoing problem in schools across the country. As a device for ensuring compliance with its remedial mandates, Title IX conditions the continued receipt of federal education funds on a school's agreement not to discriminate on the basis of sex.

Title IX uses monetary sanctions as a lever to protect substantive rights. While no doubt derived in part from Congress' power under the Spending Clause of Article I, Title IX simultaneously draws from Congress' power to enforce the substantive guarantees of the Equal Protection Clause of the Fourteenth Amendment. Both at the time Title IX was first passed, as well as in subsequent amendments, Congress left little doubt that its object in enacting Title IX was to secure equal protection for women in the educational process.

Given Title IX's remedial goals, it can and should be interpreted using the same principles of statutory construction that the Court has applied to other Section 5 legislation. Specifically, it is important to distinguish between knowledge of the facts and knowledge of the law. After *Gebser*

v. Lago Vista Indep. School Dist., 524 U.S. __, 118 S.Ct. 1989 (1998), it may be necessary to prove that defendants had actual knowledge that particular discriminatory acts occurred before they can be held liable for damages. But it does not follow that when, as here, defendants were fully aware of the underlying conduct, they can escape liability by claiming ignorance that the conduct was prohibited under law.

This Court has never required Congress to spell out every form that discrimination might take when it enacts a civil rights statute. Moreover, any such holding would seriously eviscerate Congress' broad remedial powers under Section 5. Consistent with that principle, *amici* respectfully submit that the Eleventh Circuit's holding that student-to-student sexual harassment claims are never actionable under Title IX cannot be sustained. To the contrary, such claims fit easily within the broad prohibitory language of Title IX.

ARGUMENT

I. SECTION 5 OF THE FOURTEENTH AMENDMENT PROVIDES AN INDEPENDENT SOURCE OF CONSTITUTIONAL AUTHORITY FOR TITLE IX

In resolving this case in favor of the school board, the Eleventh Circuit held (based on a discussion contained entirely in a single footnote) that Congress enacted Title IX solely pursuant to its authority under the Spending Clause. Beginning with that premise, the Eleventh Circuit then applied contract law principles to the interpretation of Title IX and concluded that student-to-student harassment is not prohibited by the statute, notwithstanding its broadly worded ban against sexual discrimination in federally funded education programs.

Largely for reasons set forth in petitioner's brief, *amici* believe that the decision below must be reversed even under current Spending Clause jurisprudence. *Amici* also believe, however, that the Eleventh Circuit erred in failing to recognize that Section 5 of the Fourteenth Amendment provides an independent source of constitutional authority for Title IX. The purpose, scope, and legislative history of Title IX make it clear, in our view, that Congress saw Title IX as more than a condition on federal funding; it saw it as a means of enforcing the core principles of equality embodied in the Equal Protection Clause.

A. Congress May, And Often Does, Act Pursuant To More Than One Source Of Constitutional Authority When Adopting Legislation

The Eleventh Circuit appeared to assume that it was under some obligation to choose between the Spending Clause and Section 5 as the proper constitutional basis for Title IX. Nothing in the Constitution or this Court's cases, however, requires that choice. To the contrary, the notion that a particular congressional statute may rest on more than one source of constitutional authority is hardly a novel one, especially in the civil rights context.

For example, this Court's decision upholding the constitutionality of the 1964 Civil Rights Act in *Heart of Atlanta, Inc. v. United States*, 379 U.S. 241, 249 (1964), expressly noted that "Congress based the Act on Section 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce . . . ." Because of its conclusion that the Commerce Clause provided adequate authority for the public accommodations provisions of the 1964 Act, the majority found it unnecessary to reach the Fourteenth Amendment issues. *Id.* at 279 (Black, J., concurring). But two separate concurrences nonetheless concluded that Congress had properly invoked its Section 5

powers. *Id.* at 280 (Douglas, J., concurring); *id.* at 293 (Goldberg, J., concurring). Of particular note for present purposes, no member of the Court challenged Justice Goldberg's observation that Congress could rely on what he described as "dual" support for its civil rights statutes. *Id.* at 292 n.1.

It is not surprising, therefore, that in rejecting a constitutional challenge to the 1974 amendment to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621-624 (1967), the Seventh Circuit referred to "the familiar pattern of contemporary civil rights acts in grounding prohibitions against private parties in the Commerce Clause, while reaching government conduct by the more direct route of the Fourteenth Amendment." *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982).

Moreover, the question of whether Congress acted pursuant to its Section 5 authority does not depend on a specific reference in the statutory text itself or even in the legislative history. As this Court noted in an analogous context, "Congress need not [have] recite[d] the words '§5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983)(holding that because Title VII was enacted pursuant to Section 5 it overrides any Eleventh Amendment claim by the states). Rather, the question is whether Congress, "as an objective matter," *had the constitutional authority* to act pursuant to its power to enforce the Equal Protection Clause. *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997). Here, this standard is easily met because Section 5 of the Fourteenth Amendment grants Congress the authority to enforce the substantive guarantees of the Fourteenth Amendment and Title IX is plainly within the ambit of that enforcement authority.

Applying these principles, the majority of courts to address the question have had little difficulty concluding that

the constitutional roots of Title IX lie in Section 5 of the Fourteenth Amendment as well as the Spending Clause. *See, e.g., Doe v. University of Illinois*, 138 F.3d 653 (7th Cir.), *petition for cert. filed*, 67 U.S.L.W. 3083 (July 13, 1998)(No. 98-126)(prohibiting "arbitrary, discriminatory conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment")(internal citations omitted); *Crawford v. Davis*, 109 F.3d at 1283 ("we are unable to understand how a statute [Title IX] enacted specifically to combat [gender] discrimination could fall outside the authority granted to Congress by Section 5"); *Franks v. Kentucky School for the Deaf*, 142 F.3d 360 (6th Cir. 1998)(same). *But see Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1013 n.14 (5th Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 165 (1996).[2]

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[2] In rejecting a Section 5 basis for Title IX, the court below merely noted that the prohibitions contained in Title IX extend beyond the state actors reached by the Fourteenth Amendment. *Davis*, 120 F.3d at 1398 n.12. *But see District of Columbia v. Carter*, 409 U.S. 418, 423-24 & n.8 (1973)(that "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct' . . . is not to say . . . that Congress may not proscribe purely private conduct under Section 5 of the Fourteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966)(Section 5 permits Congress to regulate conduct beyond what Section 1 prohibits); *United States v. Guest*, 383 U.S. 745, 762 (1966)(Clark, J., concurring, joined by Black and Fortas, JJ.)("there can be no doubt" that Congress can regulate private conduct under Section 5); *City of Boerne v. Flores*, 521 U.S. __, 117 S.Ct. 2157 (1997), citing with approval prior precedent refusing to limit Congress' Section 5 powers to conduct that violates Section 1, but holding that Section 5 legislation must be designed in part to remedy such discrimination. However, even if enforcement legislation enacted pursuant to Section 5 were bound by a similar state action requirement, the Eleventh Circuit's observation has little relevance to this case, which involves only governmental defendants.

B. The Purposes And Remedial Structure Of Title IX Are Fully Consistent With The Broad Antidiscrimination Goals Of Section 5 And The Equal Protection Clause

Title IX guarantees that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. §1681. Respondents do not and cannot deny that they are covered by the terms of Title IX. It is equally too late in the day to dispute that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996)(holding that the Equal Protection Clause prohibits a state-funded educational institution from discriminating against students on the basis of their sex absent an "exceedingly persuasive justification"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)(same); *Reed v. Reed*, 404 U.S. 71 (1971)(holding that sex-based classifications violate the Equal Protection Clause of the Fourteenth Amendment).

Thus, the purposes of Title IX and the purposes of the Equal Protection Clause are entirely congruent, at least in cases like this where Title IX is invoked against public officials operating federally funded programs. In such cases, Title IX is simply one means of enforcing the equality guarantees of the Fourteenth Amendment. Viewed in these terms, it fits comfortably within the scope of congressional authority conferred by Section 5, which this Court has expansively and deferentially construed for more than a century.

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment and perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional powers.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879), *quoted with approval in City of Boerne v. Flores*, 117 S.Ct. at 2163.

There is little doubt that Title IX is well "adapted to carry out" the antidiscrimination goals of the Fourteenth Amendment. To be sure, the threat of a federal fund cut-off serves the purposes of the Spending Clause by ensuring that federal money is spent for its intended purposes and not used to promote discrimination. But by discouraging discrimination, the threat of a federal fund cut-off also promotes the purposes of the Equal Protection Clause.

In addition, this Court has recognized that Title IX can be enforced by a private right of action, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and that an injured plaintiff can recover monetary damages under Title IX, *Franklin v. Gwinnett County Pub. School*, 503 U.S. 60 (1979). Thus, federal funds may be the trigger for Title IX, but the loss of federal funds is not the only remedy. As this Court explained in *Cannon*, the existence of these two remedial alternatives is critical to understanding Title IX.

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protections against those practices. Both of these purposes were repeatedly identified in the debates . . . ."

441 U.S. at 704. Even if the first purpose could be described as more closely aligned with the Spending Clause, the second purpose just as clearly reflects the antidiscrimination goals of the Fourteenth Amendment.[3]

C. The Legislative History Of Title IX Reinforces The Conclusion That Congress Was Acting Pursuant To Section 5

Although Congress did not expressly refer to the source of its constitutional authority when enacting Title IX, the legislative record is replete with references to the pervasive discrimination against women in education. In the words of Senator Bayh: "It is clear to me that sex discrimination reaches into all facets of education -- admission, scholarship programs, faculty hiring and promotion, professional staffing and pay scales." 118 Cong.Rec. 5803 (1972). *See also*

[3] Last Term, in *Gebser v. Lago Vista Independent School Dist.*, 118 S.Ct. at 1998, the Court described Title IX as a form of Spending Clause legislation. *See also Franklin*, 503 U.S. 75 n.8 ("[W]e need not decide which power Congress utilized in enacting Title IX"). Neither petitioner nor *amici* have ever contested that point. But, for reasons stated above, it does not follow that Congress was not also acting pursuant to its Section 5 powers. In fact, insofar as *Gebser* assumed that Congress abrogated the states' Eleventh Amendment immunity in Title IX claims, 118 S.Ct. at 1996, the Court must also have assumed that Title IX was enacted under Section 5. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Indeed, after this Court's decision in *Seminole Tribe*, numerous courts have continued to uphold damages claims against governmental defendants under Title IX based on their understanding that Title IX is a valid exercise of Congress' Section 5 powers. *See Doe*, 138 F.3d at 657 ("Title IX and the Equalization Act (CRREA) read together, unequivocally state Congress' intent to abrogate the States' Eleventh Amendment immunity"); *Crawford*, 109 F.3d at 1283 ("Congress has unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity for Title IX claims").

"Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Committee on Education of the House Committee on Education and Labor," 91st Cong., 2d Sess. (1970). This concern with discrimination speaks in the language of the Fourteenth Amendment even if the Fourteenth Amendment was not specifically invoked, and should be sufficient at least to create a presumption that Congress was acting pursuant to its Section 5 powers.[4]

Furthermore, it is perfectly clear from the subsequent legislative history that Congress thought it was acting under Section 5 when it adopted Title IX. Thus, only four years later, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, which provides attorneys' fees to successful civil rights plaintiffs. Section 1988 authorizes the disbursement of attorneys' fees to prevailing parties in actions to enforce a series of civil rights statutes, including Title IX. The legislative history plainly establishes that Congress acted pursuant to the Fourteenth Amendment when enacting §1988:

> Fee awards are therefore provided in cases covered by [§1988] in accordance with Congress' power under, *inter alia*, the Fourteenth Amendment, Section 5.

S.Rep.No. 1011 at 5, 94th Cong. 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5913.

[4] Nothing in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), undermines the strength of this inference. The question in *Pennhurst* was whether the provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§6000-6083, were enforceable against the states through an implied right of action. The Court held that they were not, in part because of the Court's reluctance to impose new financial obligations on the states that Congress had not expressly authorized. That concern does not apply in this case, however, because the Court has already held that Title IX can be enforced by a private damages action.

Standing alone, §1988 does not create any rights. Instead, §1988 derives its authority from the underlying statutes that it is designed to enforce. In this case, the logical inference is that §1988 and Title IX are both grounded in the Fourteenth Amendment. And, indeed, this Court recognized as much in *Cannon*, when it relied on the legislative history of §1988 to buttress its description of Title IX as part of "'the civil rights enforcement scheme' that successive Congresses have enacted over the past 110 years" to "enforce the Fourteenth Amendment by eliminating discrimination." 441 U.S. at 686 n.7, quoting 122 Cong.Rec. 31472 (1976)(remarks of Sen. Kennedy).[5]

Even more persuasively, when Congress strengthened the enforcement mechanisms under Title IX by enacting the Civil Rights Remedies Equalization Act Amendment (CRREA), 42 U.S.C. §2000d-7 (1994), it explicitly invoked its authority under both Section 5 and the Spending Clause. Senator Cranston, who was the legislative sponsor of CRREA, specifically noted:

> Congress has the authority to waive the States' Eleventh Amendment immunity under . . . the spending clause and section 5 of the Fourteenth Amendment. [T]his legislation is clearly authorized by [these] two provisions.

131 Cong.Rec. 22, 346 (1985). The Justice Department expressed a similar view in its official statement on CRREA:

> Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, S. 1579 makes Congress' intention "unmistakably clear in the language of the statute" to subject states to the jurisdiction of the federal courts.

132 Cong.Rec. 28, 624 (1986)(letter from Assistant Attorney General John R. Bolton to Senator Orrin Hatch).[6]

The legislative history detailing CRREA's enactment is as definitive as the legislative history relied upon by the Court when holding that Title VII was enacted pursuant to Section 5. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457, n.9 (1976)("There is no dispute that in enacting the 1972 Amendments to Title VII . . . Congress exercised its power under Section 5 of the Fourteenth Amendment"). Like §1988, CRREA is a derivative statute, enacted to enforce legislation, including Title IX. The logical inference, again, is that if CRREA was enacted pursuant to both Section 5 and the Spending Clause, then so was Title IX, CRREA's underlying statute.

In short, Congress' intent to implement broad antidiscrimination provisions when enacting Title IX, and to do so pursuant to its authority under Section 5 of the Fourteenth Amendment, is implicit in the legislative history of Title IX and explicit in the legislative history of CRREA and §1988.

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[5] Here, as in *Cannon*, the Court would be "remiss if it ignored these authoritative expressions concerning the scope and purposes of Title IX." 441 U.S. at 686 n.7.

[6] CRREA was enacted in response to the Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985), which held that Congress must make "unmistakably clear" its intent to abrogate Eleventh Amendment immunity. CRREA therefore specifies that: "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . Title IX of the Education Amendments of 1972 . . . ."

II. THIS COURT HAS NEVER REQUIRED ANTI-DISCRIMINATION LAWS ENACTED PURSUANT TO SECTION 5 TO DETAIL EVERY FORM OF PROHIBITED DISCRIMINATION

The question of whether or not Title IX prohibits student-to-student harassment is ultimately an issue of statutory interpretation and congressional intent. But the Eleventh Circuit's approach to that question inevitably was affected by its view that Title IX was enacted solely pursuant to the Spending Clause. Even if Congress is required "to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding," *Davis*, 120 F.3d at 1399, this Court has never imposed a similarly restrictive rule of statutory construction on Section 5 legislation. To the contrary, the Court has consistently held that antidiscrimination laws enacted under Section 5 should be liberally construed to promote the broad equality principles of the Fourteenth Amendment.

This principle of construction is not a license to Congress to "decree the substance of the Fourteenth Amendment's restrictions on the states." *City of Boerne*, 117 S.Ct. at 2163. But it does suggest that it is particularly inappropriate for courts to elevate form over substance when interpreting the nation's civil rights laws. Obviously, there is a point at which any law becomes so vague that its enforcement offends basic notions of due process. However, that is a far cry from the Eleventh Circuit's conclusion that the sweeping terms employed in a civil rights law such as Title IX must be read to permit every form of discrimination that is not explicitly prohibited.

That is not the approach this Court has ever taken. More to the point, it is not the approach this Court took when it first ruled, in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that sexual harassment is a form of sex-

ual discrimination under Title VII. Nothing in the language of Title VII referred to sexual harassment, and petitioner strenuously argued that the words of the statute could not be read to bar a hostile work environment absent some evidence that the respondent had suffered tangible economic consequences. This Court unequivocally rejected the restrictive reading that petitioner proposed.

Instead, the Court read the statute in light of its underlying purposes and concluded that "[t]he phrase 'terms, conditions, or privileges or employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 63, citing *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). Next, the Court pointed to EEOC guidelines specifying that sexual harassment is a form of sex discrimination prohibited by Title VII and that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." 477 U.S. at 65. *Cf.* 62 Fed.Reg. 12034, 12039-40 (1997)(OCR final policy guidance under Title IX prohibiting peer harassment in schools). Relying on both sources of authority, the Court concluded that sexual harassment that rises to the level of a hostile work environment could form the basis of a Title VII violation. *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)("[T]he very fact that discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality").

Both before and after *Meritor*, the lower courts have followed a similar approach in broadly interpreting civil rights laws enacted pursuant to Section 5. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), cited in *Meritor*, 477 U.S. at 65, was the first case to recognize a cause of action based upon a racially discrim-

inatory work environment. In *Rogers*, the Fifth Circuit held that a Hispanic plaintiff could establish a Title VII violation by demonstrating that her employer created a hostile work environment for employees by giving discriminatory service to its Hispanic clientele. *Id.* at 238. The appellate court explained that "Title VII should be accorded a liberal interpretation" and, in accordance with this broad interpretation, held that Title VII's protections extend beyond the economic aspects of employment:

> [T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority groups . . . .

Id.

Other lower courts have applied this broad reading of Title VII to harassment based on race, religion, national origin, and discriminatory sexual harassment. *See, e.g., Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C.Cir. 1976)(race); *Compston v. Borden, Inc.*, 424 F.Supp. 157 (S.D. Ohio 1976)(religion); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977)(national origin); *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 934-44 (D.C. Cir. 1981); *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780 (E.D.Wis. 1984)(sexual harassment), *cited in Meritor*, 477 U.S. at 66.

In each of these contexts, the fact that Title VII does not mention harassment has not prevented the courts from concluding nonetheless that harassment violates the statute.

Besides recognizing harassment as a form of discrimination covered by Title VII, the Court has found that other discriminatory practices not mentioned in Title VII also are covered by the statute. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), for example, the Court considered whether Title VII covered testing procedures and employment criteria that discriminate on the basis of race. The employer in *Griggs* had instituted policies requiring new hires and transfers at a power generating facility to possess a high school degree and to obtain satisfactory scores on two aptitude tests. Though cognizant that "nothing in the Act preclude[d] the use of the testing or measuring procedures," *id.* at 436, the Court found that the purpose of Title VII, "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," supported the recognition of a Title VII claim based on the discriminatory impact of ostensibly neutral employment practices.

The principle that Section 5 statutes should be construed liberally is hardly a new or controversial one. When construing "mere federal-state funding statutes" -- *i.e.*, those passed under the spending power that do not create new substantive rights -- the Court has looked to "whether the State voluntarily and knowingly accept[ed] the terms of the 'contract,'" so that it can fairly be said that the State had an opportunity to comply with the federal funding requirement. *Pennhurst*, 451 U.S. at 17, 18.[7] By contrast, when constru-

[7] The notion that the source of constitutional authority may be relevant in determining the required level of statutory specificity was central to the Court's holding in *Pennhurst*, 451 U.S. at 17.

ing acts that enforce the substantive rights of the Fourteenth Amendment, the Court has never required the statute to specify that a particular form of discrimination is prohibited as a prerequisite to a statutory violation. As *Meritor* demonstrates, the fact that a remedial statute enacted pursuant to the Fourteenth Amendment does not spell out each form of prohibited discrimination does not immunize that form of discrimination from the statute's reach. Courts look instead to the overall purpose of the statute to determine its substantive scope.

In recognition of the intended purpose of Title IX, the Court has long supported a broad reading of the statute's substantive scope. In *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), quoting *United States v. Price*, 383 U.S. 787 (1966), the Court instructed that the text of Title IX should be accorded "'a sweep as broad as its language.'" The Court in *Cannon* again supported a broad interpretation of Title IX when it inferred in Title IX a private right of action, though the statute's language does not explicitly authorize one. *Cannon*, 441 U.S. at 694-98; *see also id.*, at 703 ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination"). Moreover, for the persuasive reasons petitioner articulates in her brief, recognizing that student-to-student sexual harassment claims fall within Title IX is consistent with Title IX's plain meaning and legislative history. The fact that defendant school officials allowed sexual harassment to flourish, regardless of whether that harassment was perpetrated by a teacher or a student, should therefore subject them to liability under Title IX.

Last Term's decision in *Gebser v. Lago Vista Indep. School Dist.*, 118 S.Ct. 1989, is not to the contrary. The holding of *Gebser* is that a school district cannot be held

liable in damages under Title IX for teacher-student harassment unless it had actual knowledge of the harassment. This case involves a different issue entirely. *Gebser* was concerned with ensuring that defendants have adequate notice of the existence of the discrimination before they are held liable in damages. Defendants undeniably had that notice here. Accordingly, the only issue in this case is whether defendants can claim immunity from damages because Congress did not provide them in advance with a laundry list of every possible discriminatory act that may be actionable under Title IX. Nothing in *Gebser* can plausibly be read to impose that obligation on Congress. More importantly, any such obligation would seriously impede civil rights enforcement and run counter to the well-established rule that civil rights laws should be broadly construed.

The court below reached the wrong result because it followed the wrong interpretive path. By treating Title IX as nothing more than a contract between the federal government and the school districts it funds, the Eleventh Circuit lost sight of Title IX's roots in the Fourteenth Amendment. As a result, it construed Title IX as though it were part of the tax code rather than an important part of this nation's civil rights laws. Under Section 5, the relevant question is not whether Congress mentioned the problem of peer sexual harassment in the text of Title IX or even its legislative history. The relevant question is whether peer sexual harassment can ever rise to the level of discrimination on the basis of sex. The answer to that question is surely yes, as this Court recognized in *Meritor* and *Harris*. Petitioner's complaint was therefore improperly dismissed.

CONCLUSION

For the reasons stated herein, the judgment of the court below should be reversed.

Respectfully submitted,

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